No. 15682

In the United States Court of Appeals for the Ninth Circuit

CLACKAMAS MEAT COMPANY, INC., an Oregon Corporation, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal from the United States District Court for the District of Oregon

---

BRIEF FOR THE UNITED STATES

GEORGE COCHRAN DOUB,
Assistant Attorney General,

C. E. LUCKEY,
United States Attorney,

SAMUEL D. SLADE,
B. JENKINS MIDDLETON,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

CITATIONS

Case:

Statutes and regulations:

In the United States Court of Appeals for the Ninth Circuit

No. 15682

CLACKAMAS MEAT COMPANY, INC., an Oregon Corporation, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal from the United States District Court for the District of Oregon

---

BRIEF FOR THE UNITED STATES

This action was brought by the United States to recapture meat subsidy payments which were made to appellant in 1945 and 1946 under a meat subsidy program conducted in accordance with the first proviso of Section 2(e) of the Emergency Price Control Act of 1942, as amended (50 U.S.C. App. 902(e)). The payments, made on preliminary approval of appellant's subsidy claims, were subsequently invalidated by the Reconstruction Finance Corporation (RFC)

(R. 4-10).[1] The district court entered judgment for the United States on June 10, 1957 on the basis of appellee's motion for summary judgment and the record (R. 22). On July 5, 1957 the court entered an order denying appellant's motion to set aside the judgment (R. 29), and on July 10, 1957 appellant filed a notice of appeal from the judgment entered on June 10, 1957 (R. 24-25).

The jurisdiction of the district court rested upon 28 U.S.C. 1345. This Court's jurisdiction rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

The statutory background.—Section 2(e) of the Emergency Price Control Act of 1942, 56 Stat. 24, 50 U.S.C. App. (1946 Ed.) 902, authorized the Federal Loan Administrator to pay subsidies in such amounts and upon such terms and conditions as the Administrator, with the approval of the President, should determine to be necessary to obtain the required production of commodities previously determined by the President to be strategic or critical. The Section further provided that these subsidies were to be paid by corporations created and organized pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, 48 Stat. 1108, as amended, 15 U.S.C. 606(b)(3). Meat having been defined by the President as a "strategic or critical material", Section 2(e) thus had the

[1] References to the Transcript of Record printed on the appeal will be deseignated "R. —". References to appellant's brief will be designated "Br. —".

effect of empowering the Federal Loan Administrator, with the approval of the President, to make the determination of the need for subsidy payments to producers of this commodity. Under the Stabilization Act of 1942, 56 Stat. 756, as amended, 50 U.S.C. App. (1946 Ed.) 961, *et seq.*, as supplemented by Executive Order 9250 (7 F.R. 7871), the Director of Economic Stabilization was given overriding policy authority over all price and stabilization agencies. In carrying out this authority, the Director on May 7, 1943, ordered the Federal Loan Administrator to initiate the Livestock Slaughter Subsidy Program. On the same day, the Federal Loan Administrator (who was also Secretary of Commerce), directed the President of the Defense Supplies Corporation, a corporation created purusant to Section 5(d) of the Reconstruction Finance Corporation Act, to pay subsidies to livestock slaughterers, packers, and wholesalers. This directive was implemented by the issuance of Defense Supplies Corporation Regulation No. 3, which became effective June 7, 1943 (8 F.R. 10826), and which was reissued as Revised Regulation No. 3, effective January 19, 1945 (10 F.R. 4241). By Joint Resolution of June 30, 1945 (59 Stat. 310), Congress dissolved Defense Supplies Corporation and transferred its subsidy administration functions to Reconstruction Finance Corporation.

The large number of monthly subsidy claims (estimated to have been approximately 26,000) rendered it administratively impossible to make a rapid determination as to the accuracy or validity of each sub-

mitted claim. On the other hand, the prompt payment of claims was necessary in order to enable the slaughterers to continue operation. Accordingly, slaughterers were permitted to certify that their claims were accurate and that they had not wilfully violated any regulation of the Office of Price Administration or the War Food Administration during the monthly reporting period covered by the claims. The latter certification was required because, the subsidy program being an adjunct of price and distribution controls, compliance with the regulations of related agencies was a condition precedent to entitlement to subsidy payments. Defense Supplies Corporation was authorized to pay, upon preliminary approval, duly certified subsidy claims.[2] The applicable regulations gave the administrative agency the right, however, upon a finding that claims preliminarily approved were invalid or defective, to withhold or invalidate payments and to require restitution in whole or in part of any payments made thereon.[3]

The facts of this case.—Appellant, a meat slaughterer doing business in Clackamas, Oregon, made claim for and received meat subsidies under this program (R. 4-5, 10-11). After payment on the basis

---

[2] D.S.C. Regulation No. 3, effective June 7, 1943, Section 5(d) (8 F.R. 10827); Revised Regulation No. 3, effective January 19, 1945, Section 7003.9(c) (10 F.R. 4243).

[3] D.S.C. Regulation No. 3, effective June 7, 1943, Section 5(d) (8 F.R. 10826); Revised Regulation No. 3, effective January 19, 1945, Section 7003.9(d) (10 F.R. 4241), and Section 7003.9(e), added by Amendment No. 3, effective May 5, 1945 (10 F.R. 8073, 11153).

of preliminary approval of the claims, an official audit disclosed errors in the claims for the monthly periods of May, 1945 through October, 1946, as well as a failure to comply with administrative regulations requiring preservation of records supporting subsidy claims. An administrative finding that the claims in question were invalid or defective was thereupon entered and, in accordance with the applicable regulations, the claims were invalidated (R. 4-5). The Reconstruction Finance Corporation issued two letter orders dated December 18, 1947, invalidating the claims and establishing claims receivable in the total amount of $16,472.81 [4] (R. 8-10).

The complaint in this action (R. 3-10) was filed in the district court on April 24, 1956. After setting forth the foregoing facts, the complaint alleged that the Government had made repeated demands upon appellant for the payment of the claims, together with interest, but that appellant had refused and continued to refuse to pay them (R. 6). Judgment was demanded in the amount of $16,472.81, with interest and costs (R. 6). On May 29, 1956, the Government filed a request for admission of facts and authen-

---

[4] One of these orders (R. 8-9) established a claim receivable in the amount of $147.90, representing the amount of subsidies which had been paid upon meat which remained in appellant's inventory at the termination date of the subsidy program. Since appellant's answer (R. 11) admitted that its claims had been "properly invalidated" in this amount, and since appellant apparently stands ready to repay this amount, only the order set forth at R. 9-10 is involved on this appeal.

ticity of documents (see R. 27).[5] Paragraph 11 requested that appellant admit that, after receipt of the letters of December 18, 1947, it had made no further protest to any federal agency with respect to these orders, or that if any protest had been made it had been administratively denied (App. B, *infra*, p. 25). Appellant filed both its Answer and its Answer to Plaintiff's Request for Admissions on August 13, 1956 (R. 10-12, 28). The Answer alleged, *inter alia*, that appellant had duly protested the orders and that no determination of the protests had been made (R. 11). Paragraph 11 of the request for admissions was denied (App. B, *infra*, p. 26).

The Government's Reply, filed on October 1, 1956, denied generally the allegations that a protest had been filed and not determined (R. 13-14). Subsequently, however, the Government filed a Motion to Stay Proceedings in order to enable appellant to exhaust its administrative remedies (R. 14-19). In

---

[5] Pertinent portions of the request for admissions, of appellant's answer to this request, and of the transcripts of the proceedings at the hearings in the court below are printed in Appendix B to this brief, *infra*, pp. 25-29, pursuant to the authorization of the Clerk of this Court. The omission of these documents from the printed Transcript of Record was due to appellant's failure to serve upon Government counsel a designation of the record for printing as required by Rule 17(6) of the Rules of this Court. As a result, the record was printed with no opportunity for Government counsel to designate those portions of the record which it wished to have printed. The material printed in the Transcript corresponds to that designated by appellant in the district court to go forward to this Court on the appeal. In the district court, the Government counter-designated the entire record to be forwarded.

an affidavit in support of this motion, the Assistant United States Attorney in charge of the case stated that, in view of appellant's allegations respecting the filing of a protest, it appeared that appellant had in fact protested the orders in question (R. 18). The Assistant United States Attorney further stated that "I am informed and therefore believe and declare herein, that Defendant desires to further perfect its administrative appeal, demand a complete administrative hearing, and exercise its statutory right to a hearing before the United States Emergency Court of Appeals, if deemed appropriate, all pursuant to USC Tit. 50 App., Sec. 924" (R. 18-19). The Motion was also accompanied by a Memorandum citing authority for the propriety of entering such a stay in the circumstances of the case (R. 15-17).

On April 8, 1957 the district court denied the Motion for Stay and set the case down for trial on April 16, 1957 (R. 28). When the case was called on that date, Mr. Cosgrave, counsel for appellant, informed the court that he was not ready for trial, and that he had no witnesses present (App. B, *infra*, pp. 26-27). The Assistant United States Attorney informed the court that the Government had no witnesses but was ready to proceed. Mr. Cosgrave thereupon stated that "I think, Your Honor, that actually the case goes on a matter of law * * *" (App. B, *infra*, p. 27). The court then entered an order resetting the trial date to April 29, 1957, with the condition that the case might be referred to RFC by the parties before that date, and that the trial date of April 29, 1957 would be stricken if the case were so referred, further

ordering that if the parties desired a trial, after consideration by RFC, that the request for such a trial be made by June 10, 1957 [6] (R. 28).

On May 27, 1957 the Government filed a Motion for Summary Judgment, accompanied by the affidavit of the Assistant United States Attorney (R. 19-21). The affidavit noted that the court had ordered that the trial set for April 29, 1957 should be stricken if appellant "instituted an appeal with the Reconstruction Finance Corporation" prior to that date, and that he had been informed that RFC had received no protest or appeal from appellant as of May 2, 1957 (R. 20-21). Appellant apparently filed no response to this motion before the motion came on for hearing on June 10, 1957 (see R. 29). At that time Mr. Cosgrave again assured the court that "* * * it is purely, Your Honor, a legal question" (App. B, *infra*, p. 28). The following colloquy ensued (App. B. *infra*, pp. 28-29):

> THE COURT: I thought you were going to ask the administrative body to make a determination of this case?
>
> MR. COSGRAVE: Your Honor, I took that up with my client.
>
> THE COURT: You never asked them?

---

[6] We are informed by the United States Attorney that this order was never reduced to writing, other than as it appears in the minute entry of April 16, 1957, printed in the Transcript of Record at p. 28. Although the colloquy between the court and counsel which was the basis of the order noted on the minutes took place on April 16, 1957, the date of the proceedings transcribed *infra*, at pp. 26-27, there was no reporter present when the order was orally rendered.

MR. COSGRAVE: No, Sir; no, Sir.

THE COURT: The plaintiff may have motion for summary judgment. * * *

The court accordingly entered a Judgment Order on June 10, 1957, giving the Government judgment against appellant in the sum of $22,780.80 (R. 22). After appellant's motion to set aside the judgment was denied (R. 23, 29), appellant filed notice of appeal on July 10, 1957 (R. 24-25).

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are set forth in pertinent part in Appendix A, *infra*, pp. 21-24.

SUMMARY OF ARGUMENT

Appellant urges as the single ground for reversal of the judgment below that summary judgment was precluded because there was an unresolved dispute between appellant and the Government as to a material issue of fact, namely, whether appellant had earlier protested the RFC order of December 18, 1947. Any such contention in this Court is foreclosed by the assurances of counsel for appellant, made to the court below on two separate occasions, that only legal and not factual issues were involved in this case. Moreover, the record plainly reveals that the Government's acquiescence in appellant's insistence that it had mailed a protest to RFC eliminated the earlier dispute upon which appellant now relies. It was this acquiescence which prompted the Government's motion to stay the district court proceedings in order

that an administrative determination of the protest might be made. Appellant, however, failed to take advantage of the opportunity afforded it by the district court to submit its documented objections to the administrative agency. As a result, the Government became entitled to judgment as a matter of law, since the then-final administrative order of December 18, 1947, which was not subject to invalidation by the district court, created a valid debt enforceable by summary judgment proceedings.

ARGUMENT

The District Court Properly Entered Summary Judgment for the United States

A. There Was No Genuine Issue of Material Fact raised in this Case.

On this appeal, appellant contends that the order of the district court granting summary judgment for the Government is in error and must be reversed. One ground for reversal, and one ground only, is urged upon this Court: that the court below erred because "[t]here was a material fact question at issue before the court which could not be resolved by summary judgment" (Br. 6). "Upon a motion for summary judgment", says appellant, "it is no part of the court's function to decide issues of fact, *but solely to determine whether there is an issue of fact to be tried*" (Br. 10; emphasis added).

When the Government filed its Motion for Summary Judgment, counsel for appellant did not file a response to the motion urging that there was a ma-

terial issue of fact to be tried. Indeed, no written response was filed at all (see R. 27-29). When the motion for summary judgment came on for hearing, and the court below was faced with the question of whether factual issues were involved, counsel for appellant likewise did not urge that there was a material issue of fact to be tried. Quite the contrary. Counsel for appellant at that time informed the court—in clear, unmistakable language, and for the second time—that *"it is purely, Your Honor, a legal question"* (App. B, infra, p. 28; emphasis added). At the earlier hearing, counsel for appellant had used somewhat different phraseology: *"I think, Your Honor, that actually the case goes on a matter of law * * *"* (App. B, infra, p. 27; emphasis added).

The court below took counsel for appellant at his word. This reliance upon counsel's assurance, appellant now says—through the same counsel—was reversible error which this Court is obliged to correct. We submit that such an argument affronts the intelligence of both this Court and the court below.

Nevertheless, since counsel for appellant now insists that he was mistaken in the court below and thereby led the district court into error, it is incumbent upon us to demonstrate that he was in fact correct in agreeing with the Government that no genuine issue of material fact was involved. The "disputed question of fact" which appellant now seeks to raise is as to whether or not appellant had protested the RFC orders of December 18, 1947 (Br. 6, 11, 12). In other words, appellant contends that, at the time the order appealed from was entered, the

United States was disputing appellant's allegation, contained in its Answer, that it had theretofore duly protested the administrative orders in question. It is abundantly clear from the record of the course of the proceedings below, however, that the Government did not dispute the genuineness of this allegation. Indeed, the Government's acceptance of its genuineness was the very basis of the Government's Motion to Stay Proceedings.

It is apparent from the allegations of the complaint that, at the time it was filed, the Government's files contained no record of any protest having ever been filed by appellant (R. 3-10). Appellant, however, alleged in its Answer and in its response to the Request for Admissions that it had in fact protested the orders in question (R. 11; App. B, *infra*, pp. 25-26). The Government, in turn, still having no record of the filing of the alleged protest, filed a Reply denying appellant's allegations relating to the protest (R. 13-14).

On further consideration, however, the Government revised its position, since it was apparent that an impasse had been reached. Obviously, the fact that the Government's files did not contain the alleged protest was not proof that no protest had been sent, nor was the fact that appellant had forwarded a protest, if true, proof that the protest had been received by RFC. In view of the seeming equities in favor of appellant in this situation, the Government decided to accept as true appellant's contention that it had in fact forwarded a protest, and recommended

a procedure whereby appellant could have all the advantages—in the form of administrative and, if necessary, Emergency Court consideration of its protest—which would have accrued to it had the protest to the 1947 order in fact been timely received. This procedure was set forth in the Government's Motion to Stay Proceedings (R. 14), designed to suspend the district court action while appellant presented its case on the merits of the order to RFC, the only forum authorized by law to make an initial determination of a challenge to an order such as the one here involved. The sole basis for this Motion was the concession that appellant had in fact made a bona fide effort to protest the 1947 orders. A Memorandum in support of the Motion cited authorities for entering a stay in analogous circumstances, including an order entered by Judge (now Mr. Justice) Whittaker, in an almost identical case (R. 15-17).

In further support of this Motion, the Assistant United States Attorney in charge of the case filed an affidavit which made the Government's position in the matter crystal clear. He there stated (R. 18; emphasis added):

> It appears from the files and pleadings herein, and more particularly, from Defendants Response to Plaintiff's Request for Admissions No. 11, *that Defendant did make an administrative protest following receipt of the letters of December 18, 1947* * * *.

Yet appellant seeks to obtain a reversal on the ground that the Government persisted in its contention that appellant did *not* "make an administrative protest

following receipt of the letters of December 18, 1947 * * *".

In the end, appellant itself acknowledges that it does not believe in its own argument to the effect that there was a continuing dispute between appellant and the Government as to whether or not appellant had forwarded a protest. At page 14 of its brief, appellant states (emphasis added):

> The appellant alleged, *and it appears that the Government almost concedes* (R. 18), that the appellant duly filed protests against 1947 orders.

The record reference is to the language in the affidavit of the Assistant United States Attorney just quoted. In view of the unequivocal nature of that language, the use of the word "almost" to modify "concedes" in appellant's statement is surely misplaced, and cannot serve to veil the fact that no dispute existed.

Appellant seeks to extricate itself from the position in which the words of its own counsel and the plain import of the record places it by claiming, apparently, that the Government's motion for stay was spurious, being designed "to force appellant to appeal when it had nothing from which to appeal * * *" (Br. 13; see also Br. 14). Appellant points to the statute[7] and notes that it "required the Administrator, in the event he denied such a protest as appellant alleges it filed, to inform the protestant of the grounds upon which such decision was based * * *. It was from

---

[7] Section 203(a) of the Emergency Price Control Act of 1942, 56 Stat. 31, as amended, 58 Stat. 638, 50 U.S.C. App. 923.

such a decision that appellant would have had a right of appeal" (Br. 13-14). Appellant's clear implication is that the Government intended to "force" appellant to appeal from an administrative denial of its protest when no such administrative denial had ever been made.

But the record cannot possibly be read in this fashion. The only appeal from an administrative denial of a protest is to the Emergency Court of Appeals;[8] there is no such thing as a further appeal within the administrative agency. Had the Government intended that appellant be "forced" to appeal from a non-existent denial of its protest, it would have moved for a stay to permit appellant to go directly to the Emergency Court. Instead, it moved for a stay "pending the outcome of an *administrative* appeal" (R. 14; emphasis added). The Memorandum in support of the motion stated that the "motion should be granted to enable Defendant to exhaust the *administrative* remedies, now available to it" (R. 15; emphasis added). The affidavit of the Assistant United States Attorney, after referring to "an appeal by Defendant to the Reconstruction Finance Corporation" stated as follows (R. 18-19; emphasis added):

> I am informed and therefore believe and declare herein, that Defendant desires to further perfect its *administrative* appeal, demand a com-

---

[8] Section 204(a) of the Act provides that "Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, * * * specifying his objections * * *". See App. A, *infra*, p. 22.

> plete *administrative* hearing, and exercise its statutory right to a hearing before the United States Emergency Court of Appeals, if deemed appropriate * * *.

Apparently no objection to this statement was ever lodged by appellant.

What is immediately apparent from the foregoing is that when the Government's motion papers referred to an "administrative appeal" (see R. 14, 18, 19, 21), the reference was to the protest proceedings themselves, which constitute the statutory method of taking an administrative appeal from an adverse administrative order.[9] What is further apparent is that in entering its order of April 16, 1957, the district court intended to give appellant the time necessary to lodge with RFC the protest which had previously miscarried, and to file such supporting documents and arguments as it might see fit, in order that an administrative determination of the protest, objecting to the merits of the 1947 order, might be made.

Appellant never took advantage of the opportunity thus afforded it. Accordingly, the Government filed its motion for summary judgment on May 27, 1957, accompanied by an affidavit stating that RFC had "received no protest nor appeal from the defendant

---

[9] Section 203(a) of the Act provides that "At any time after the issuance of any * * * order under section 2, * * * any person subject to such * * * order may * * * file a protest specifically setting forth objections to any such provision * * *". See App. A, *infra*, pp. 21-22.

* * * as of the 2nd day of May, 1957" [10] (R. 21). At the hearing on this motion, Judge Solomon stated to counsel for appellant that he "thought you were going to ask the administrative body to make a determination of this case", and counsel for appellant conceded that he had never done so (App. B, *infra*, pp. 28-29). The court thereupon immediately granted summary judgment for the Government.

It may be that appellant is arguing that it was, and still is, under the impression that, under the order of April 16, 1957, it was RFC and not appellant which was expected to take the first step toward the administrative determination of the protest which had never in fact reached RFC.[11] If that were appellant's understanding, it would surely have been disabused of this misconception by the Government's Motion to Dismiss and the accompanying affidavit (R. 19-21). Appellant could then have attempted to convey this misunderstanding, if it existed, to the court below in a written response, but it failed to do so. At the hear-

---

[10] The affidavit noted that the Government's Motion to Stay Proceedings sought a stay "pending the outcome of an appeal to the Reconstruction Finance Corporation, which the defendant, Clackamas Meat Co., Inc., proposed to institute". It further noted that the order of April 16, 1957 had provided that the resetting of the trial "should be stricken if, prior to the 29th day of April, 1957, the Clackamas Meat Co., Inc., instituted an appeal with the Reconstruction Finance Corporation" (R. 21).

[11] It will be noted that the original concession by the Government that appellant "did make an administrative protest" was based upon the allegations of appellant, and not upon any information within the actual knowledge of the Government in general or RFC in particular (R. 18).

ing, Judge Solomon clearly expressed his understanding that it was appellant who was to be the moving party in the administrative proceedings, and the reply of counsel for appellant to the court's questioning did not contradict this.

In view of the foregoing, we see absolutely no merit in the single point relied upon by appellant on this appeal: that there was an unresolved issue of fact which precluded summary judgment.

B. The United States was Entitled to Judgment as a Matter of Law.

Although appellant does not make the further contention that, even if there were no issue of fact here, the Government would not be entitled to judgment as a matter of law, a brief summary of the law supporting the judgment below may prove helpful to the court. Since counsel for appellant are counsel for appellee in *United States* v. *Frank L. Smith*, No. 15505 in this Court, set for argument on January 17, 1957, we shall incorporate by reference much of the authority cited in the Government's brief in that case in order to avoid unnecessary repetition here.[12]

In its brief in the *Smith* case, the Government points out that Section 204(d) of the Emergency Price Control Act of 1942 (App. A, *infra*, pp. 22-23) vests in the Emergency Court of Appeals exclusive jurisdiction to determine the validity of any order issued under Section 2 of the Act, and precludes any other court from exercising such jurisdiction. Section

---

[12] The brief will be cited as "*Smith* Br. —".

203 of the Act (App. A, *infra*, pp. 21-22) provides the sole existing avenue of review of such orders: the filing of a protest with the issuing agency.[13] If the protest is denied, further review may be sought in the Emergency Court of Appeals (*Smith* Br. 8-9). Orders invalidating meat subsidy claims, such as the order of December 18, 1947, are orders "issued under Section 2" within the meaning of these protest and exclusive review provisions (*Smith* Br. 9-10). As a result, the district court was obliged to consider the order of December 18, 1947 as conclusively establishing a valid debt, judicially enforceable by way of summary judgment proceedings, absent a subsequent nullification of the order by the administrative agency or the Emergency Court, or the pendency of administrative or Emergency Court proceedings seeking such nullification.

When it became apparent in the court below that appellant had in fact earlier attempted to lodge a protest with RFC, the court, at the Government's urging, quite properly gave appellant an opportunity, subject to time limitations, to go before the administrative agency in order to perfect its previously-aborted attempt at protest. Had appellant taken advantage of this opportunity, the Government would have lost its entitlement to summary judgment, at least for so long as appellant diligently prosecuted its administrative and, if necessary, its Emergency Court remedies.

---

[13] See *Smith* Br. 9, note 5, for a discussion of a second avenue of review available prior to 1947.

But appellant chose to ignore the proffered means of further staving off the summary judgment from which it now appeals. Appellant has never yet explained its inaction in this regard. The only reasonable inference is that appellant in fact had no real grounds for seeking the administrative reversal of the order in question. In these circumstances, appellant has no standing to contend that the Government was not entitled to judgment as a matter of law or to object to the action of the district court in entering summary judgment.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be affirmed.

GEORGE COCHRAN DOUB,
Assistant Attorney General,

C. E. LUCKEY,
United States Attorney,

SAMUEL D. SLADE,
B. JENKINS MIDDLETON,
Attorneys,
Department of Justice,
Washington 25, D. C.

December 1957

APPENDIX A

1. The pertinent provisions of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U.S.C. App. (1946 Ed.) 901, *et seq.* are as follows:

Section 2 [50 U.S.C. App. 902]

* * * *

(e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided*, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d: * * *

Section 203 [50 U.S.C. App. 923]

(a) At any time after the issuance of any regulation or order under section 2, or in the

case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. * * *

Section 204 [50 U.S.C. App. 924]

(a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. * * * Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding. * * *

* * * *

(d) * * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, or-

der, or price schedule or to restrain or enjoin the enforcement of any such provision.

(e) * * *

(2) In any proceedings brought pursuant to section 205 of this Act * * * or section 37 of the Criminal Code, involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

* * * *

(ii) during the pendency of any protest properly filed by the defendant under section 203 * * * prior to the institution of the proceeding under section 205 of this Act * * * or section 37 of the Criminal Code, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. * * *

2. Defense Supplies Corporation Revised Regulation No. 3, effective January 19, 1945 (10 F.R. 4243), as amended by Amendment No. 3, effective May 5, 1945 (10 F.R. 8073 and 11153), provides in pertinent part as follows:

Section 7003.9(c). *Frequency.* Payments will be made monthly upon preliminary approval of the claim.

(d) *Terms.* Preliminary approval and payment of claims shall not constitute final accept-

ance of the validity or amount of the claim. On a finding that the claim is invalid or defective, Defense Supplies Corporation shall have the right to require restitution of any payment or any part thereof. Any sums found to be due to Defense Supplies Corporation shall be deductible against any accrued or subsequent claim for any payment by Defense Supplies Corporation to the person.

Section 7003.10(a). *Compliance with Other Regulations.* Defense Supplies Corporation shall declare invalid, in whole or in part, any claim by an applicant who, in the judgment if the War Food Administrator or the Price Administrator, has wilfully violated any regulation or order of their respective agencies applicable to the purchase or sale of livestock or to livestock slaughter or to the sale or distribution of meat, and any claim of any applicant who the Price Administrator certifies to Defense Supplies Corporation has been determined in a civil proceeding to have violated a substantive provision of any regulation or order of the Office of Price Administration applicable to the purchase or sale of livestock or to livestock slaughter or to the sale or distribution of meat.

APPENDIX B

[Title of District Court and Cause]

PLAINTIFF'S REQUEST FOR ADMISSION OF FACTS AND AUTHENTICITY OF DOCUMENTS

Comes now the plaintiff, appearing by and through C. E. Luckey, United States Attorney for the District of Oregon, and Thomas B. Brand, Assistant United States Attorney, and pursuant to the provisions of Rules 36 and 37(c) of the Federal Rules of Civil Procedure, hereby requests admission by the defendant of the following facts, within 21 days after service upon it of this request:

* * * *

11. That the said Clackamas Meat Co., Inc. did not, after receipt of the letters of December 18, 1947, make any further protest to the Office of Defense Supplies, to the Reconstruction Finance Corporation or to any other federal agent in regard to the matters contained therein, or that if any protest was made by Clackamas Meat Co., Inc., the protest was administratively denied.

* * * *

[Filed May 29, 1956]

[Title of District Court and Cause]

ANSWER TO PLAINTIFF'S REQUEST FOR ADMISSIONS

Comes now the defendant and for answer to plaintiff's request for admissions herein states as follows:

* * * *

11. Denied.

* * * *

[Filed August 13, 1956]

[Title of District Court and Cause]

Portland, Oregon
April 16, 1957

BEFORE:

The Honorable Gus J. Solomon, District Judge.

APPEARANCES:

Mr. Thomas B. Brand, Assistant United States Attorney, apearing in behalf of the United States of America;

Mr. Walter J. Cosgrave, of Attorneys for Defendant.

COURT REPORTER:

Gordon R. Griffiths.

TRANSCRIPT OF PROCEEDINGS

THE COURT: Are you ready, Mr. Cosgrave?

MR. COSGRAVE: No, Your Honor, I am not.

THE COURT: You are the one that wanted to go to trial.

MR. COSGRAVE: That is correct, Your Honor. When I received the card, Your Honor, that it was set for the sixteenth, I then attempted to contact the Court and to find out which case was going to take precedence. I have just learned this morning that apparently your Clerk did call my office and Mr. Goodwin's office and advised us that the case of Burow v. Holman was going over until two o'clock, but neither one of us got the word. We actually came here this morning with our clients, prepared for a jury case.

THE COURT: Where are your witnesses in the Clackamas Meat Company case?

MR. COSGRAVE: They are not here. As a matter of fact, Your Honor, I wrote my client, who is the only individual involved, at Prineville, and told him that the case would be heard sometime this week, and it was my assumption that it would be heard after this Burow v. Holman case was disposed of.

THE COURT: I do not see how you got that assumption. You called my office to find out, and we called back and told you this morning it was going to be the first one.

MR. COSGRAVE: Your Honor, I am sorry. The Clerk says that he called the office. It is apparent that he did, but I didn't get the word.

THE COURT: Have you got your witnesses here? (To Mr. Brand.)

MR. BRAND: I have no witnesses, Your Honor, but the government is ready to proceed at any time.

MR. COSGRAVE: I think, Your Honor, that actually the case goes on a matter of law, and it is my thinking—

THE COURT: Set it over until Friday. Take it up Friday morning at ten o'clock.

MR. COSGRAVE: Thank you, Your Honor, and I apologize to the Court, and I wish the Court to know that it was inadvertent. We came with the understanding that this case was set for ten this morning.

(Hearing concluded.)

Certified to be a true and accurate transcript of all proceedings had in said cause at the said time and place.

GORDON R. GRIFFITHS
Court Reporter

[Filed August 1, 1957]

[Title of District Court and Cause]

Portland, Oregon
Monday, June 10, 1957

BEFORE:
The Honorable Gus J. Solomon, District Judge.

APPEARANCES:
Mr. Edward J. Georgeff, Assistant United States Attorney, appearing in behalf of the United States of America;
Mr. Walter J. Cosgrave, of Attorneys for Defendant.

COURT REPORTER:
Gordon R. Griffiths.

TRANSCRIPT OF PROCEEDINGS

THE COURT: What happened in that case?

MR. COSGRAVE: Your Honor, I contacted my people. Apparently there was nothing in the corporation to allow them to go forward. I talked to the man who is the principal stockholder in it. It will be our position—I pointed out to the Court that on the status of the record the government does not make a case against the defendant and could not make a case because the matter actually—the petition to the R.F.C. which was originally made has never been acted upon. I think the Court indicated a contrary feeling with respect to that, but I believe it is purely, Your Honor, a legal question.

THE COURT: I thought you were going to ask the administrative body to make a determination of this case?

MR. COSGRAVE: Your Honor, I took that up with my client.

THE COURT: You never asked them?

MR. COSGRAVE: No, Sir; no, Sir.

THE COURT: The plaintiff may have motion for summary judgment. Summary judgment may be entered against defendant.

MR. COSGRAVE: Thank you.

(Hearing concluded.)

Certified to be a true and correct transcript of all proceedings had at said time and place in said cause.

GORDON R. GRIFFITHS
Court Reporter

[Filed August 1, 1957]

☆ U. S. GOVERNMENT PRINTING OFFICE: 1957 450984 856